TESTIMONY OF ELLIOT M. MINCBERG BEFORE SENATE COMMERCE, SCIENCE, AND TRANSPORTATION COMMITTEE ON INTERNET FILTERING IN SCHOOLS AND LIBRARIES
MARCH 4, 1999

Mr. Chairman and members of the Committee, thank you for inviting me to testify today. My name is Elliot Mincberg, and I am vice president, general counsel, and legal director of People For the American Way Foundation, a 300,000-member citizens' organization dedicated to protecting civil and constitutional rights and to promoting effective public education.

As we prepare to enter the 21st Century, a key issue for People For and its members, and for many other Americans, concerns access to and restrictions on the Internet, including in public schools and libraries. We served as co-counsel in the Reno v. ACLU case in which the Supreme Court struck down the federal Communications Decency Act. Along with a broad spectrum of journalists, publishers, Internet service providers, and others, we filed an amicus curiae brief in support of the preliminary injunction recently issued against the enforcement of the federal COPA ("Child Online Protection Act") legislation. We have represented a group of citizens in Loudoun County, Virginia in a successful challenge to a restrictive public library Internet policy in Mainstream Loudoun v. Board of Trustees of the Loudoun County Public Library, 24 F. Supp. 2d 552 (E.D. Va. 1998). To the best of our knowledge, the court's decision in that case is the first in the nation to directly address the constitutionality of a mandatory library Internet filtering policy. We have also filed amicus curiae briefs in Kathleen R. v. City of Livermore, in which a state court has rejected an effort to force libraries to restrict the Internet. I also serve on the board of directors of the Internet Education Foundation and have participated in numerous conferences and forums on Internet-related issues. Perhaps most important, we have advised and consulted with numerous parents, teachers, librarians, school districts, and libraries across the country, who have successfully dealt with Internet access issues in their local communities without lawsuits and without restrictive federal legislation.

2000 M Street ♦ Suite 400 ♦ Washington, DC 20036
Telephone 202.467.4999 ♦ Fax 202.293.2672 ♦ E-mail pfaw@pfaw.org ♦ Web site http://www.pfaw.org

Based on this experience, we strongly agree with those who have extolled the tremendous benefits of Internet access for schools, libraries, and families across America. We also believe that filtering and related technologies can and should play an important role with respect to Internet access, particularly for parents and children. But mandatory Internet filtering in public libraries and schools, particularly if mandated by the federal government as a condition on E-rate access, raises serious legal and constitutional problems and threatens to frustrate the tremendous potential of the Internet.

Three facts lead to this conclusion. First, as the courts have consistently ruled, government attempts like S.97 to restrict the Internet and Internet access are subject to strict scrutiny under the First Amendment and, so far, have been ruled unconstitutional. Second, mandatory Internet filtering, even when imposed by public libraries and schools themselves, can create significant First Amendment problems and ignore more effective alternatives. Finally, federal Internet filtering mandates would multiply these legal problems, impose unjustified federal mandates on local library and school boards, and interfere with more effective local efforts to deal with Internet access issues.

1. Government attempts like S.97 to restrict the Internet or Internet access using "harmful to minors" and similar prohibitions have been consistently subjected to strict, and fatal, First Amendment scrutiny

S.97 seeks to require the use of Internet filtering to block material deemed by someone to be "harmful to minors." Last year, S.1619 used the phrase "inappropriate for minors." The Communications Decency Act sought to ban "indecent" or "patently offensive" material. The Loudoun County library board required Internet filtering in order to block information, including material "harmful to juveniles."

The federal courts have considered First Amendment challenges to four attempted government restrictions on the Internet or Internet access using these terms. In each one of those cases, the courts have ruled that the government restrictions are presumptively invalid and must be subject to strict First Amendment scrutiny. That means that such restrictions can be upheld only if the government can show

that they are necessary to serve a compelling government interest and are the least restrictive means to promote that interest. In each case, moreover, the courts have issued permanent or preliminary injunctions against these government mandates. These rulings include the CDA and Loudoun County decisions, where the Supreme Court and a federal district court in Virginia ruled those government restrictions unconstitutional, as well as preliminary injunctions issued against the COPA legislation and a permanent injunction against a New Mexico "harmful to minors" Internet statute. See Reno v. ACLU, 521 U.S. 844 (1997)(CDA); Mainstream Loundoun, supra (mandatory library Internet filtering); ACLU v. Reno, _ F.Supp. 2d _ (E.D. Pa. Feb.1, 1999) (COPA); ACLU v. Johnson, 4 F.Supp. 2d 1029 (D.N.M. 1998)(New Mexico statute).

The reason for these rulings is clear, and very important as this Committee considers legislative proposals in this area. As the courts have explained, proposed "harmful to minors" and similar limitations are attempted content-based restrictions of speech that is clearly protected at least as to adults, and possibly for older minors. As the Supreme Court explained, for example, the CDA could apply to "large amounts of nonpornographic material with serious educational or other value," such as "a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to [the] Pacifica opinion, or the consequences of prison rape." Reno v. ACLU, supra, slip op. at 32,25. This is particularly true for adult and other patrons served by public libraries, and for older students in some high schools. It would be a serious mistake, for the sake of our libraries and schools as well as the First Amendment, to force them to block all such material on the Internet.

2. Mandatory Internet filtering, even when imposed by public libraries and schools themselves, raises serious First Amendment problems and can ignore more effective alternatives

The only court case so far to consider the issue of a public library or school board mandating the use of Internet filters is the Loudoun County case, which offers some important lessons about the legal and other problems with such policies. In a split vote, the library board enacted a policy requiring that all Internet terminals be equipped at all times, for adults and anyone else, with software blocking all

material that could be deemed harmful to juveniles, obscenity, or child pornography. Library staff quickly concluded that there is of course no filtering software that can block only material that is legally "harmful to minors" or outside the First Amendment. After staff evaluation in late 1997, the library purchased what it considered the most effective software available –blocking software called "X-Stop." X-Stop's CEO admitted in the Loudoun case that filtering software companies cannot as a matter of law and generally do not even attempt to distinguish legal from illegal materials, whether based on "harmful to minors" or other standards.

As the court in the Loudoun case found, however, it was undisputed that X-Stop blocked websites that contained absolutely no material covered by the policy. Library staff and Loudoun residents we represented in the case found a large number of blocked sites, such as the American Association of University Women, the Heritage Foundation, the Yale Graduate Biology Program, a number of sex education-related sites, and a beanie babies web page. The library board's own expert witness concluded that X-Stop improperly blocked non-pornographic sites, and that it also failed to block what he considered sites "likely to be found obscene" 16% of the time.

The court found that the Loudoun policy violated the First Amendment on several grounds. First, applying the strict scrutiny test, it determined that the policy was not necessary to promote a compelling government interest. The court agreed that the interests in "minimizing access to illegal pornography" and avoiding a "sexually hostile environment" were compelling. But as the court explained, the board failed to demonstrate that the danger of these harms from unfiltered access in the Loudoun library environment was real and that the policy was therefore necessary. Despite extensive research by library staff and by a national expert hired by the Board, the only available evidence was a single complaint in another Virginia library, which was resolved through the use of privacy screens, and news reports of a few isolated incidents in the entire United States. The Board's expert's own statements, the court explained, indicated that such problems are "practically nonexistent." Loudoun, supra, slip op. at 31. (Although the Board's expert and other advocates have since claimed to have found more examples, none of these were submitted to the court or otherwise independently scrutinized.) Along the same lines, the Supreme Court in Reno cited findings and testimony that "[a]lmost all sexually explicit images are preceded by warnings as to the content,"

and that the "'odds are slim' that a user would come across a sexually explicit sight by accident." Reno, supra, slip op. at 23. In light of such findings, mandatory blocking policies such as the one in Loudoun are likely to continue to be found to fail strict scrutiny.

The court also found that the policy failed strict scrutiny because it was not the least restrictive means to accomplish its objectives. This was in part because the policy deliberately reduced adults to what was fit for juveniles by seeking to impose the "harmful to juveniles" standard upon everyone, even if the software had been able to be more precise. In addition, the court found that there were a number of specific less restrictive alternatives available, such as acceptable use or internet access policies and allowing adults to decide for themselves whether or not to utilize a filter. After the court's decision in November, the Board adopted just such a policy, and by all reports, it has worked successfully. We are hopeful that with the adoption of this new policy, the case will be able to be resolved in full without further legal proceedings.

The court also ruled that the policy was unconstitutional for another reason: it imposed an illegal prior restraint on speech. The use of blocking software effectively censored thousands of sites without any kind of legal test or due process before access was cut off to library patrons, without any specific standards, and based on the subjective (and often inaccurate) judgments of software company employees. The policy failed to include any of the procedural safeguards consistently required by the courts even where local law enforcement enforces constitutional obscenity laws, such as expeditious administrative and judicial review with the censor bearing the burden of proof. As the court explained, a library board or other public entity "cannot avoid its constitutional obligation by contracting out its decisionmaking to a private entity" like a software company. Loudoun, supra, slip op. at 42.

The decision in Loudoun makes clear that, at the very least, serious constitutional, legal, and practical problems are raised by mandatory filtering policies adopted by public libraries. This is particularly true where policies apply to all users, including adults, and offer no flexibility or alternatives. Although courts are generally much more reluctant to overturn decisions by school districts concerning materials utilized within a school, particularly where

curriculum decisions are concerned, there may be significant problems for school districts as well. Much of the time, school Internet access is provided in school libraries, available to students for use on their own time. Despite the deference generally accorded to school officials, the courts have made clear even recently that improper content-based decisions to censor or remove materials from school libraries can be successfully challenged in the courts. See, e.g., Campbell v. St. Tammany Parish School Bd., 64 F.3d 184 (5th Cir. 1995)(reversing grant of summary judgment for school board in challenge to removal of book from school library); Case v. Unified School Dist., 908 F.Supp. 864, 875 (D.Kan. 1995)(ruling that school district improperly removed book from school library because of "disagreement with the ideas expressed"). At the very least, school officials should carefully consider the reasons and need for filtering policies in the specifics of particular school environments and the various methods available to accomplish their objectives before adopting policies in this area.

In fact, many schools and libraries have gone through precisely this kind of process concerning Internet access, and have come up with effective local solutions suited to their local needs. Some involve some use of filtering. Some do not. For example, both in a small town just south of Spokane, Washington, and in my daughter's middle school in suburban Washington, school officials have decided not to employ mandatory filters, but instead to design and implement "acceptable use" policies that oblige students to learn to use the Internet properly. Different practices may be employed even within the same school district depending on the age of students, where and how the Internet is used, the amount of supervision exercised, whether problems are in fact encountered, and a host of factors. We encourage that kind of local review and development, which brings me directly to my final point – the dangers of federal mandates in this area.

3. Federal filtering mandates would increase legal problems, impose unjustified federal requirements on schools and libraries, and interfere with local efforts to deal more effectively with Internet access issues

For public schools and libraries, a federal requirement that they mandate filtering in order to receive E-rate access will only multiply legal problems. Their mandatory filtering

policies would still be subject to the same type of constitutional challenges as in the Loudoun case. In fact, since many would feel they have no choice but to adopt mandatory filtering immediately regardless of their local needs or conditions, it would be less likely that they would develop the specific educational and other rationales and review of available alternatives that could help them defend their policies in court. The result could well be to multiply litigation around the country and to make it less likely that many Internet access policies using filtering would be successful.

Under S.97, this problem could be particularly acute for public schools, which would be required to adopt mandatory filtering for E-rate access, regardless of their particular educational needs or available alternatives. Although S.97 would not expressly require all libraries to adopt policies as severe as in Loudoun County, libraries would also face problems. Each of the many libraries with only one Internet-accessing computer would have to mandate filtering or certify that it uses a "reasonably effective alternative means." Although S.97 forbids the federal government from reviewing decisions as to what material is harmful to minors, libraries could face federal scrutiny under the bill of the effectiveness of such "alternative means." This could push many towards reflexively adopting mandatory filtering. Legal and practical problems could similarly arise for libraries with two or more computers but which have technical problems with outfitting multiple computers differently or could be forced to severely curtail the amount of unfiltered access to library users.

All these legal dilemmas would exist for proposals such as S.97 regardless of whether the legislation itself could be challenged under the First Amendment. In addition, however, such a provision itself could well violate the First Amendment by improperly requiring that protected speech be infringed in order for libraries and schools to receive E-rate access. As the report of this Committee on S.1619 recognized last year, the answer to this question depends upon whether the provision is more like the abortion "gag rule" upheld in Rust v. Sullivan, 500 U.S. 173 (1991), or the program in which a public university subsidized the expenses of student publications other than a Christian student newspaper in Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995). As the Committee report also recognized, this in turn depends on whether the government is

the speaker or subsidizer of a particular message, or whether it is seeking to encourage a diversity of views and types of free expression. See S. Rep. No. 105-226 (June 25, 1998) at 5.

This question, however, must be answered not from the perspective of schools or libraries, as suggested in last year's Committee report, but from the perspective of the federal government, which would be imposing the filtering mandate. From the federal government's perspective, it is clear that a wide diversity of Internet-based expression is being encouraged and promoted, but that the federal law singles out and excludes so-called "harmful to minors" speech. That is much more like the university's exclusion of religious speech in Rosenberger than it is like Rust. Indeed, even after Rust, the federal courts have made clear that attempts to impose comparable restrictions on First Amendment expression of recipients of government benefits or subsidies remain unconstitutional. See, e.g., Board of Trustees of Stanford University v. Sullivan, 773 F.Supp. 472 (D.D.C. 1991) (ruling unconstitutional requirement prohibiting government grant recipients from publicly discussing or publishing preliminary research results without federal approval).

Apart from the strictly legal and constitutional arguments, a federal requirement like S.97 applying to every public school and library in the country as a condition for E-rate access is clearly unwise. It directly contradicts principles of federalism, local control, and avoiding federal mandates advocated by members of both parties in this Congress. In the specific context of Internet access, there is little or no evidence that local school and library authorities cannot deal with this issue. Indeed, there is a great deal of evidence precisely to the contrary, some of which this Committee has heard today. A federal mandate would interfere with school-based acceptable use policies and other methods that can more effectively deal with Internet access issues than a monolithic federal requirement. In addition, although we disagree with last year's COPA legislation, we do agree with the House Commerce Committee's conclusion that a "national mandate requiring the use of blocking or filtering could lead to private censorship or inadvertent blocking." H. Rep. No. 105-775 (Oct. 5, 1998) at 19.

Last November, the U.S. National Commission on Libraries and Information Sciences conducted an all-day hearing as part of an extensive inquiry into the subject of "Kids and the Internet: the Promise and the Perils." The Commission

concluded that public and school libraries should carefully establish Internet use policies, which could include a number of different elements based on local needs and conditions, sometimes including some use of filtering software. It promulgated specific guidelines for libraries to use in formulating policies. But the Commission specifically did not advocate mandatory filtering for all situations, and specifically did advocate that these decisions be made at the local level. As the Commission's executive director explained, "libraries [and I would add schools] are the level of government closest to the people – it is not appropriate for the federal government to step in." C. Macarinta, *Agency Frowns on Net Filtering*, CNET news.com (Feb. 17, 1999)(www.news.com/news/Item/0,4,32492,00.html). That fundamental principle should be respected by us all.

Indeed, any federal action at this time would be particularly inappropriate because prior to the end of this year, Congress will receive a report from a commission it created to address precisely this issue. As part of last year's COPA legislation, Congress created a temporary Commission on Online Protection, which is composed of government and industry representatives, and which is to conduct a study regarding "methods to help reduce access by minors to material that is harmful to minors on the Internet." H. Rep. 105-775 (Oct. 5, 1998) at 28-29. Congress should carefully study this report before taking action. If any federal role is appropriate, it may turn out to be a proposal such as that by Senator Burns last year to ensure that schools and libraries adopt Internet use policies focusing on minors' use of the Internet without dictating the specific contents of those policies. This is similar in principle to NCLIS' recommendations. A federal Internet filtering mandate, however, would not only raise serious legal and constitutional problems, but would also frustrate effective development of the Internet and the objectives that the mandate itself is designed to promote.

Thank you very much.